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Nos. 93-1456 and 93-1828

In the

Supreme Court of the United States

October Term, 1994

U.S. TERM LIMITS and WINSTON BRYANT,
in his official capacity as Attorney General,
Petitioners,
v.
RAY THORNTON, et al., and BOBBIE E. HILL, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CITIZENS FOR TERM LIMITS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, WINSTON BRYANT AND U.S. TERM LIMITS

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Pursuant to Supreme Court Rule 37, Citizens for Term Limits and Pacific Legal Foundation respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioners, Winston Bryant and U.S. Term Limits. Consent to the filing of this brief has been granted by counsel for petitioners State of Arkansas and U.S. Term Limits, and has been lodged with the Clerk of this Court.

Respondents Dale Bumpers, Republican Party of Arkansas, and Americans for Term Limits have also granted consent to the filing of this brief which has been lodged with the Clerk of this Court. Respondent Hill has granted written consent to the filing of this brief and the letter of consent has been lodged with the Clerk of this Court. Respondent Thornton and other respondents have withheld consent, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Citizens for Term Limits (CTL) is the parent organization of the campaign committee that spearheaded the petition drive and campaign support for California's Proposition 164. Proposition 164, like Arkansas' Amendment 73, restricts ballot access of California's congressional incumbents after those incumbents have served for a set number of terms in the House of Representatives and the Senate of the United States. It is Citizens for Term Limits' policy to support congressional term limits in California as well as all other states. Citizens for Term Limits has intervened in the case challenging Washington's Initiative 573, now pending in the Ninth Circuit Court of Appeals (*Thorsted v. Gregoire*, Consolidated Docket Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287,

94-35289, *cert. denied sub nom. Citizens for Term Limits v. Foley*, Docket No. 93-1833 (June 20, 1994)).

Pacific Legal Foundation and Citizens for Term Limits are submitting this brief because they believe their public policy perspective and litigation experience in the ballot access restriction arena will provide an additional viewpoint with respect to the issues presented. PLF and CTL submitted an amicus brief in support of the petition filed in this case. PLF has also participated in numerous other cases before this Court including *Legislature of the State of California v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992), *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991), *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. ___, 115 L. Ed. 2d 379 (1991), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

PLF and Citizens for Term Limits believe the Arkansas Supreme Court incorrectly analyzed the relationship between Amendment 73 and Article I, Sections 2 and 3, of the United States Constitution. The minimal qualifications imposed by Sections 2 and 3 of age, residency, and citizenship are simple, straightforward qualifications that a candidate either possesses or not. Amendment 73, instead of disqualifying certain incumbents from serving, only restricts certain incumbents' names from the ballot for the same office for which they previously served. This is a question of ballot access, not qualifications. When analyzed under this Court's ballot access cases utilizing the framework of the First and Fourteenth Amendments, Amendment 73 must be upheld as constitutional. These points may not be adequately covered by the parties whose interests may not extend beyond the Arkansas borders. Citizens for Term Limits and Pacific Legal Foundation, concerned with preserving ballot access restrictions for California's 54 congressional incumbents and familiar with California's experience with state term limits for the past four years, are uniquely situated

to analyze the issues involved in this case and to bring a wider scope of policy considerations to this Court.

For the foregoing reasons, Citizens for Term Limits and Pacific Legal Foundation request that their motion to file the amicus curiae brief which follows be granted.

DATED: August 15, 1994.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

CASES

Page

UNITED STATES CONSTITUTION

Page

MISCELLANEOUS

Page

Page

Nos. 93-1456 and 93-1828

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INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the preceding motion and are adopted herein.

SUMMARY OF ARGUMENT

At issue in this case are the provisions of Arkansas' Amendment 73 providing that Arkansas citizens who have had the honor of serving their state in Congress for a certain number of years must henceforth serve in that capacity only if elected by write-in votes should be upheld. Amendment 73 restricts ballot access to multiterm congressional incumbents, but permits such incumbents to serve in their old seats if elected as write-in candidates. Thus, Amendment 73 must be viewed as a ballot access restriction, not as a qualification such as those enumerated in Article I of the United States Constitution. Under the ballot access cases decided by this Court, Amendment 73 does not unconstitutionally infringe on First or Fourteenth Amendment rights. Moreover, California's four years of experience with absolute term limits on members of the state Legislature has demonstrated that such limitations do not spell the end of representative government. For the reasons set forth below, Amendment 73 should be upheld in its entirety and the Arkansas Supreme Court decision should be reversed to the extent it conflicts with such a holding of constitutionality.

ARGUMENT

Without question, the issue of congressional "term limits" is the single most important governance issue to come before this Court in decades. In 1992, no less than 14 states voted (by margins ranging from 52% to 77%) to enact some form of ballot access restriction on the long-term incumbents in Congress. The national groundswell of support for this method of reining in unaccountable political careerists shows the mandate of the People for change in the halls of Congress. Despite the clear election victories for "term

limit" proponents, opponents of the measures have taken their complaints to court. Ruling without the clear guidance of this Court on this issue, courts have erred on the side of the status quo, so far declaring measures affecting congressional elections constitutionally invalid.

I
ARTICLE I, SECTIONS 2 AND 3 DO NOT PREVENT ENACTMENT OF BALLOT ACCESS RESTRICTIONS ON LONGTIME INCUMBENTS

This case involves state elections for members of Congress. Because there are no national elections for congressional office, each state is responsible for conducting elections to determine which of its citizens will be granted the honor and privilege of serving the state in the national legislature. In the House of Representatives, in which each state elects a number of representatives proportionate to the state's population, the representatives are expected to further their states' interests in Congress. In the Senate, in which no one state can overwhelm another by sheer force of numbers, the national interest is expected to prevail. This theory was at the heart of the Connecticut Compromise, which brought the former British colonies together as the United States of America under our Constitution. Wood, *The Creation of the American Republic, 1776-1787* 558 (Univ. of North Carolina Press, 1969). The delicate balance of federal power and state power established by our Founding Fathers provides the backdrop against which the current controversy must be analyzed.

The question presented in this case is whether ballot access restrictions which prevent multiterm congressional incumbents from appearing on the ballot violate Article I, Sections 2 and 3, of the United States Constitution. Section 2, regarding qualifications for the House of Representatives states:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. Art. I, § 2, cl. 2. Section 3, regarding qualifications for the United States Senate states:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. Art. I, § 3, cl. 3. These two clauses codify what the Framers thought to be the minimum necessary requirements to assure mature, loyal, and patriotic legislators.

A. Ballot Access Restrictions on Longtime Incumbents Are Not Article I Qualifications

The threshold, and most important, question is whether the ballot access restrictions at issue in this case could rise to the level of a qualification. The distinction between ballot access restrictions and qualifications is of obvious constitutional import. Because Amendment 73 permits multiterm incumbent members of Congress to run for their seats as write-in candidates, the court below accuses the drafters of Amendment 73 of attempting to "dress eligibility to stand for Congress in ballot access clothing." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 266, 872 S.W.2d 349, 357 (1994). The court misses the point. Amendment 73 was not drafted to circumvent the Constitution, but to comply with it. The drafters were aware that term limit opponents claimed that such limits violate Article I, Sections 2 and 3.

Therefore, the initiative-amendment was drafted to avoid the constitutional problem. This was not an attempt to do indirectly what cannot be done directly, but rather an attempt to achieve admirable results in a constitutionally valid manner.[1]

The Arkansas Supreme Court explicitly recognized that "an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body." *Id.* Prior to the issue raised by this case, qualifications were defined to be absolute: either one may serve in Congress or one may not. If a potential candidate for the U.S. Senate is only 27 years old, no amount of brilliance, desire, or campaign warchest will permit her to serve her state in that capacity. The same is true for potential candidates who recently immigrated to this country or who reside outside the borders of the state they wish to represent. Here, however, even the court that struck down Amendment 73 concedes that the provisions of that amendment are not absolute. Once the court ventured beyond the absolute definition of a qualification, it trod upon the treacherous ground of line-drawing. At what point does a ballot access restriction which makes it more difficult to win an election become a qualification? The court below found that "[faint] glimmers of opportunity" to win an election transformed a ballot access restriction into a qualification. The adverse repercussions of this decision, if allowed to stand, will reach far into the election schemes of all states.

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[1] Because Amendment 73 is a ballot access restriction, this Court need not address the issue which may arise in cases involving absolute term limits: whether the Qualifications Clause is exclusive or whether the states may add to the list.

The decisions of this Court upholding numerous ballot access restrictions that substantially impair the ability of an individual to win an election strongly suggest that the court below erred in finding that a less-than-absolute ban on serving in Congress could be a qualification. *Storer v. Brown*, 415 U.S. 724 (1974), is the only major case decided by this Court which addresses Article I qualifications in the context of a ballot access restriction. *Storer* makes clear that the denial of ballot access does not establish an additional qualification. *Id.* at 746 n.16. This distinction is based on the constitutional provision giving states the initial task of determining the qualifications of voters who will elect members of Congress. Article I, Section 4, of the United States Constitution authorizes the states to prescribe "'[t]he Times, Places and Manner of holding Elections for Senators and Representatives.'" *Storer*, 415 U.S. at 730 (brackets in original).

> [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates. ... [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.

Storer, 415 U.S. at 730. In *Storer*, this Court upheld a California statute which forbade a ballot position in a general election to an independent candidate if he or she had registered affiliation with a political party within one year prior to the preceding primary election. That statute also required the candidate to file a nominating petition signed by

a number of registered voters of at least 5% of the entire vote cast in the preceding general election. *Storer*, 415 U.S. at 726-27, 733. *Storer* noted that an independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Other than the alternate means of qualifying to have his or her name preprinted on the ballot, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. *Storer*, 415 U.S. at 733. "It is an *absolute bar to candidacy, and a valid one*." *Id.* at 737 (emphasis added). The same case specifically rejected a challenge to the regulations based on Article I, holding such a claim to be "wholly without merit." *Id.* at 746 n.16.

Despite the language in *Storer*, this Court has never had occasion to explicitly state a test to determine whether a restriction amounts to a qualification within the meaning of Article I, Sections 2 and 3. The First Circuit, however, addressed this definitional problem in *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985).[2] The plaintiff in that case challenged a political party rule that only candidates with 15% of the vote at convention may challenge the convention's endorsement in a state primary. *Id.* at 99. The court held that this rule did not add a qualification for office beyond age, residency, or citizenship. Rather, it adds a restriction on who may run in the party primary in a statewide election for federal office and potentially become the party's nominee. *Id.* at 102. The court emphasized that the candidate was free to run as a write-in. *Id.* at 103. The First Circuit held that the test to determine whether or not the "restriction" amounts to a "qualification" within the

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[2] On remand, the First Circuit stated that its earlier decision on this issue remained undisturbed by the Supreme Court. *Hopfmann v. Connolly*, 769 F.2d 24, 25 n.1 (1st Cir. 1985).

meaning of Article I, Section 3, is whether the candidate "'could be elected if his name were written in by a sufficient number of electors.'" *Hopfmann*, 746 F.2d at 103. This language is consistent with this Court's position in *Storer*. If *Hopfmann* had decided that the unsuccessful candidate in that case had a constitutional right to appear on the ballot, when the candidate already had a means (although less appealing) of reaching the voters as a write-in, this would have greatly expanded the meaning of the Article I, Sections 2 and 3. Neither the plain meaning of the clauses nor this Court's interpretation of the clauses in *Storer* could have led to a different result in *Hopfmann*. Just as the regulations were upheld in *Hopfmann* and *Storer*, so too should Arkansas' Amendment 73 be upheld as a valid ballot access regulation.

The *Hopfmann* case was favorably cited in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). That case arose from former Senator Wyche Fowler's loss to Paul Coverdell in a run-off election. Although Fowler himself did not bring suit, a "consumer" organization along with four Fowler supporters sued to overturn Georgia's "majority rule" statute. *Id.* at 824. This statute requires that a candidate must receive a majority of votes cast (instead of a plurality) to be declared the winner. Fowler had won a plurality in the general election but lost the run-off election. *Id.* at 823-24. Addressing the Article I qualifications argument, the court first noted that, based on *Hopfmann's* analysis, Fowler was not precluded from obtaining the office he sought--he simply had to participate in the run-off. *Public Citizen*, 813 F. Supp. at 832. Moreover, the *Public Citizen* court found that the majority vote statute does not violate Article I, Section 3, because "the majority vote statute is more accurately interpreted as a method for construing the meaning of the votes cast." *Id.* at 833. That is, it was construed as regulating the "manner" of elections as provided by Article I, Section 4, of the Constitution. The requirement of receiving

a majority of the votes cast to be elected to the United States Senate was intended to make it more difficult for a candidate to win the seat by demanding a showing of broader support than would be required if a plurality was sufficient to claim victory. As it turned out, this requirement made it impossible for former Senator Fowler to win the seat. *Id.* at 823-24. Yet the fact that the election regulations were very harsh when applied to Senator Fowler does not make those regulations qualifications for office.

An older state case reached the identical conclusion. In *O'Sullivan v. Swanson*, 257 N.W. 255 (Neb. 1934), the Nebraska Supreme Court addressed a statute which prohibited unsuccessful primary candidates from having their names placed on the general election ballot for any state or federal office. The court upheld the law against a challenge from a candidate whose name was not printed on the ballot for United States Senate because he had lost at a primary election for governor during the same election the Senate primary was held. *Id.* at 255-56. The court upheld the statute because it did not prohibit O'Sullivan from running for the office: he was permitted to conduct a write-in campaign. *Id.* at 256. Such might have been a strong practical deterrent to election but, nonetheless, he could run, and the statute was upheld. Again, the crucial point is that the election regulation did not create an absolute bar to service in Congress. The fact that it was extremely difficult to the candidate to be successful in his campaign, did not transmute the ballot access regulation into a constitutional qualification.

B. Powell v. McCormack Does Not Forbid State-Imposed Ballot Access Restrictions on Longtime Incumbents

The court below relied principally on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), to strike down Amendment 73. *Powell* involved the refusal of

the House of Representatives to seat Adam Clayton Powell, an elected representative of New York, who had been accused of wrongfully diverting federal funds to himself, his wife, and his staff. *Id.* at 490. *Powell* centered on the authority of the House to exclude Powell under Article I, Section 5, of the Constitution which provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Before reaching its decision, the Court engaged in an extensive review of historical materials, most of which did not apply to Article I, Section 5, Clause 1. More than the actual holding of *Powell*, the court below relied on the historical review in striking down Amendment 73.

The court below cited Alexander Hamilton's statement in Federalist No. 60 that "qualifications ... are defined and fixed in the Constitution and are unalterable by the legislature" to support its conclusion, even though the court acknowledged that the passage refers only to alterations made by Congress. *Hill*, 316 Ark. at 264, 872 S.W.2d at 356. The context of the Federalist Papers was an explanation of the *federal* government, all its institutions and powers. Federalist No. 60 is no exception. This Court in *Powell*, 395 U.S. at 539, relied on this passage for the conclusion that the House of Representatives could not add a qualification which would prevent a duly elected member of the body from taking his seat. This Court recently reiterated the narrow holding of that case, noting that *Powell* stands for the proposition that "[t]he decision as to whether a member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not." *Nixon v. United States*, 506 U.S. ___, 122 L. Ed. 2d 1, 14 (1993) (emphasis in original).

Although the court below found "illuminating" the historical recitations in *Powell* (*Hill*, 316 Ark. at 265, 872 S.W.2d at 356), *Powell*'s description of the historical forces at work is incomplete. For example, Madison's

recognition that some members of Congress might achieve perpetual reelection (in Federalist No. 55) does not alter his overall view that frequent elections would result in frequent turnover: "A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men." Federalist No. 37, at 227 (Rossiter ed., 1961). Madison was a strong proponent of frequent elections for this very reason. Notwithstanding the *possibility* of long-term service in the Congress, Madison believed frequent turnover strongly benefited the new republic.

The Framers sought to solve the dilemma of expertise versus interaction with constituents by creating two houses--one with a two year term and one with a six year term. The house designed by the Framers to be most responsive to the People (the House of Representatives) had the most frequent elections. As noted, frequent elections were intended to ensure frequent turnover in members of the House.[3] Now that members of the Senate as well as the House are chosen directly by the electorate, the policy reasons for frequent elections (and frequent turnover) are just as powerful for the Senate. It is the length (not the number) of terms that determines stability.[4] The Founders designed Senate terms

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[3] "[The House of Representatives should have] an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." Federalist No. 52, at 327.

[4] At the constitutional convention, the Founders debated the need for annual or biennial elections for House members on June 21, 1787. Representative of the comments made in support of annual elections was that of Mr. Roger Sherman: "Should the members have a longer duration of service, and

(continued...)

three times the length of House terms to provide the stability necessary for any government. Farrand Vol. 1 at 415, 423. Under Amendment 73, Senators representing the State of Arkansas may (assuming reelection) have their names on the ballot for 2 terms, or 12 years. This is double the length of time the Founders believed necessary to assure stability.

Because of the limited nature of the actual question decided in *Powell*, that case did not fully address the policy and political ramifications of Article I, Section 4, on *state's* abilities to regulate congressional elections. This omission (completely understandable in the context of *Powell*) is the critical issue in this case. Article I, Section 4, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [*sic*] Senators." The last clause of the section provides for a congressional override of state election laws.

The state ratifying conventions shed some light on the interpretation of Section 4. For example, the nature of the congressional override was depicted in a dialogue between James Madison and James Monroe during the Virginia ratification debates. Monroe wanted to know why Congress had "ultimate controul over the time, place, and manner of elections of representatives, and the time and manner of that of senators." Debate in the Virginia (ratification)

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[4] (...continued)
remain at the seat of government, they may forget their constitutents [*sic*], and perhaps imbibe the interest of the state in which they reside, or there may be danger of catching the *esprit de corps*." Farrand, *The Records of the Federal Convention of 1787*, Vol. 1 (1966) (Farrand) at 365.

Convention, Farrand Vol. 3 (Appendix A, CCX), at 311-12. Madison replied that the concern was that

> [s]ome states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. ... Should the people of any state, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.

Id. at 311. Madison's concern was not with state regulation of candidates, but with assuring voters a right to vote. Madison reiterated the impracticability of micromanaging each state's elections. This is why the language in the Constitution grants broad authority to the states to conduct federal elections but permits congressional override. *Id.* Madison concluded his comments to Monroe: "But if [elections] be regulated properly by the state legislatures, the congressional controul will very probably never be exercised." *Id.* State leaders's explicit dismay during the ratification debates over Congress' control over elections demonstrates their understanding that Congress had usurped a traditional state power by the very existence of the ability to override state regulation.

This interpretation leads to the conclusion that the states could, and were expected to, regulate elections in any number of particulars. However, should states fall lax in their duties to conduct elections to send representatives to the federal legislature, Congress could alter or overrule the state's election laws so as to assure each state's participation in the federal government. The Anti-Federalists found this safety mechanism so overpowering as to render the initial ability to enact election regulations worthless. This response

is unquestionably based on the belief that Congress' power exceeds that of states on this issue.

Members of Congress who oppose ballot access restrictions (including those who brought this lawsuit) have a remedy at hand. Article I, Section 4, of the Constitution permits congressional override of state election regulations. Amici recognize the political difficulties inherent in such a remedy when 70% of Americans favor such measures. Levy, *Can They Throw the Bums Out: The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L. J. 1913, 1916 (1992) (citing Humphrey, *Put a Limit on Congressional Terms*, U.S.A. Today, Apr. 4, 1990, at A12). Getting a majority in Congress to support such a bill may well be difficult, even with the support of the Speaker of the House.[5] Nevertheless, it is the availability of the remedy, not the political expediencies attached to it, that is constitutionally significant.

The narrow holding of *Powell* combined with the broad intent and language of Article I, Section 4, gives this Court ample reason to decide this case in a way that neither overrules *Powell* nor strikes down Amendment 73. Ultimately, given the language of Section 4, the ability of Congress to fashion its own remedy, and the ability of Amendment 73 to withstand other constitutional attacks (see below), the ballot access restrictions on multiterm incumbents should be fully upheld.

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[5] Speaker of the House Thomas Foley (D-Wash.) is an appellee in the Ninth Circuit case currently pending to review a District Court's invalidation of Washington's ballot access restrictions on multiterm incumbents. *Gregoire v. Thorsted* (pending).

C. The Ballot Access Restrictions in Amendment 73 Must Be Upheld

The Arkansas Supreme Court's erroneous decision stems from its analysis of Amendment 73 under the wrong provision of the U.S. Constitution. As described above, Amendment 73 cannot be a qualification under Article I because an incumbent barred from the ballot could still serve if elected or appointed. The plurality opinion below erroneously invalidated the congressional officeholder provisions of Amendment 73 on Article I grounds and never addressed the ballot access cases in that context.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court described the balancing test that must be applied to ballot access restrictions. This test, which is the standard of review, consists of the following elements:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

The right to hold public office, by itself, is not a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142-43

(1972); *Clements v. Fashing*, 457 U.S. 957 (1982). In *Clements*, 457 U.S. at 963, this Court held that "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *See also Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) ("[c]ontrary to appellant's assertion, the right to run for public office, unlike the right to vote, is not a fundamental right"); and *Zielasko v. State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989) ("contrary to Zielasko and Bowman's assertions, running for office is not a 'fundamental right'"). Because the right to candidacy, in and of itself is not fundamental, the state's interests need only be legitimate to outweigh incumbents' ability to run for reelection in perpetuity.

Moreover, the rights of supporters of multiterm incumbents have not been unduly infringed. Notwithstanding the fact that the right to vote has been characterized as fundamental, that right is not absolute. In *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982), the Supreme Court upheld a Puerto Rico law which provided that if a commonwealth legislator died or resigned in office, the party of which the vacating legislator was a member had the right either to fill the empty seat outright, or hold an election for the seat, with only party members eligible to vote. The appointee could serve up to 40 months until the next election. The plaintiffs in that case argued that all voters had an absolute right to cast votes in the election to fill the vacant legislative seat. This Court, in upholding the law, stated that "this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one.'" *Id.* at 9 (citations omitted). This Court also noted that "[a]bsent some clear constitutional limitation," a state is "free to structure its political system to meet its 'special concerns and political circumstances.'" *Rivera-Rodriguez*, 457 U.S. at 13-14.

The compelling interests supporting rotation in office are already documented in case law and elsewhere. The policy reasons in favor of term limitation were amply explored in *Legislature v. Eu*, 54 Cal. 3d 492; 816 P.2d 1309 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992). The California Supreme Court accepted the arguments that

> the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

Eu, 54 Cal. 3d at 520, 816 P.2d at 1326. Furthermore, the court firmly recognized the advantages that are inherent in the incumbency: "Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates." *Id.* at 523, 816 P.2d at 1327-28.

Other courts have reached the same conclusion, which this Court has implicitly accepted. In *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed for want of a federal question sub nom., Moore v. McCartney*, 425 U.S. 927 (1976), the West Virginia Supreme Court upheld a two term limitation on the Governor's Office, specifically rejecting the claim that the law was undemocratic. The court stated:

> The universal authority is that restriction upon the succession of incumbents serves a rational public

> policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.
>
> ... The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raised fears of an entrenched political machine which could effectively foreclose access to the political process.
>
> ... [I]t has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. ... While elections are won by 51% of the vote, all of the people of a state must be served. Meretricious policies which sacrifice the well-being of the economic, social, racial, or geographical minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine.

Eu, 54 Cal. 3d at 520-21, 816 P.2d at 1327-28 (citations omitted). The California Supreme Court held that "many, if not all, of the considerations mentioned in *Maloney* (*e.g.*, eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch." *Id.* at 521, 816 P.2d at 1326. The court concluded that *Maloney's* analysis was pertinent to the decision before it, and that "permanent incumbency limitations are supported by legitimate and compelling considerations." *Id.* at 522, 816 P.2d at 1327.

In addition, Arkansas has a legitimate interest in restricting ballot access of multiterm incumbents to encourage the participation of women and minorities in Congress. A three-judge federal District Court recently recognized that advantages of incumbency that would otherwise dilute minority opportunities can be corrected by term limitations. *United States v. City of Houston*, 800 F. Supp. 504, 507 (S.D. Tex. 1992) (before it required a special election, the Justice Department should have considered city council term limits approved by voters as an effective means of increasing minority opportunities).

Historically, virtually all of the women and minorities who have been elected to either the House or the Senate were first elected in open seats. Of the 24 new women members of the House of Representatives in the 103d Congress, 21 were elected in open seats in 1992. Of the 47 women House members of the 103d Congress, 79% were elected in open seats. Of the seven female Senators currently serving, all but one were elected in open seats (or one in which an appointed Senator was seeking a first elected term). None of the 14 other women who have previously served as Senators defeated an incumbent member of the Senate to obtain that office. *Politics in America, 1994: The 103d Congress* (CQ Press 1993); *Women in the United States Senate*, Senate Historical Office (from U.S. Congress, House, *Women in Congress*, H. Doc. 238, 101st Cong. 2d Sess. 1991); *To Be Continued: A Study of Democratic Women's Races for the House of Representatives in 1992*, Reprint of Staton-Hughes prepared for EMILY's List (1993). Moreover, most minority members of the 103d Congress were first elected in open seats: 33 of the 38 (87%) African-American members of the House and 15 of the 18 Hispanic members. In addition, the first and only Korean-American Representative and the only American Indian Senator were elected in open seats. *Politics in America, 1994: The 103d Congress* (CQ Press 1993).

In *Anderson*, in the context of striking down a state statute that unduly restricted the ability of new and smaller parties to obtain ballot status, this Court observed that "[h]istorically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson*, 460 U.S. at 794. The Court stressed that the primary values to be protected in ballot access cases is the promotion of uninhibited, robust, and wide-open debate on public issues. *Id.* By its very nature, a system in which incumbents are encouraged to depart from office will allow election campaigns to assume a more vibrant role in the shaping of public policy.

A balancing of any injury caused to candidates and voters against the interest of Arkansas in enacting Amendment 73 demonstrates that the state's interest substantially outweighs any incidental burden on the candidates' and voters' rights. Legislators have no fundamental right to hold office indefinitely; and voters are not prevented from voting for another candidate who shares their views. As stated by the California Supreme Court:

> [I]t would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" ... is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

Eu, 54 Cal. 3d at 524-25, 816 P.2d at 1329 (brackets added and in original).

Importantly, the court below did address this Court's ballot access cases in the context of ballot access restrictions for *state* legislators, thus indicating the result it would have reached (and *should* have reached) had these cases been applied to the provisions affecting congressional officeholders. *Hill*, 316 Ark. at 270, 872 S.W.2d at 359. In the state legislator context, the court followed the decisions of this Court in *Burdick v. Takushi*, 504 U.S. ___, 119 L. Ed. 2d 245 (1992), *Anderson*, 460 U.S. 780, *Clements*, 457 U.S. 957, and *Bullock*, 405 U.S. 134. *Id.* After weighing the interests of the incumbents in perpetuating their careers against the People's desire to encourage rotation in office to promote greater accountability and responsiveness in their representatives, the Arkansas court concluded,

> the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and *even compelling* when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.

Id. at 272, 872 S.W.2d at 360 (emphasis added).

In dissent, one Arkansas justice did reach the ballot access issue with respect to congressional officeholders. Special Chief Justice Cracraft based his opinion on the very distinction the plurality refused to acknowledge: "I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a 'qualifications' issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution." *Hill*, 316 Ark. at 284, 872 S.W.2d at 368. Justice Cracraft notes that Article I, Sections 2 and 3, begin with the phrase "'[n]o person shall *be*'" a representative or senator, a choice of words demonstrating a reference to *service* in Congress, not the manner of election. *Hill*, 316 Ark. at 286, 872 S.W.2d at 369 (emphasis in original; brackets in

original). Justice Cracraft then properly examined the initiative in light of the First and Fourteenth Amendments (citing *Anderson* and *Burdick)*. He found it "not constitutionally infirm in any respect." *Id.* The importance of analyzing Amendment 73 as a ballot access measure cannot be understated. The decisions of this Court analyzing ballot access measures under the First and Fourteenth Amendment have established a framework under which provisions such as Amendment 73 can be easily upheld. *See Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309; *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993).

III
EXPERIENCE HAS SHOWN THAT BALLOT ACCESS RESTRICTIONS APPLIED TO LEGISLATIVE INCUMBENTS DO NOT DESTROY REPRESENTATIVE GOVERNMENT

When the People of California enacted Proposition 140, the Political Reform Act of 1990, the state Legislature was sure the world was ending. Proposition 140 imposed absolute term limits on all members of the California Legislature as well as the executive constitutional officers. In addition, Proposition 140 substantially reduced legislative spending and eliminated the legislative retirement plan. Naturally, California legislators proclaimed the end of effective legislative governance.

The California experience is particularly analogous to what Congress can expect as more and more incumbents are subject to ballot access restrictions or term limits. California is the nation's largest state in terms of population, budget, natural disasters, and social problems (including immigration, race riots, and so forth). California has a highly professionalized Legislature, complete with legions of staff members to assist with both policy and political issues. Also, California has operated for the past 12 years with a

Republican governor and a Democratic Legislature--a circumstance not unknown in Washington, D.C.

In the four years since term limits were enacted and upheld by the California Supreme Court (*Legislature v. Eu*, 54 Cal. 3d 492), positive effects already have been felt throughout the state. One of the primary goals of term limits--to increase the competition level of elections--has arrived with gusto.

There are 80 seats in the California Assembly (the lower house). Of the 80 members who served in 1992, 24 will not be running for the same seat in 1994. Note that this is before any Assembly member is required to leave under the terms of Proposition 140 in 1996. Of those 24 members leaving the Assembly, 10 are seeking statewide office this year, 5 are seeking state Senate seats, 1 is a candidate for a Superior Court judgeship, and 1 is running for Congress. Others are returning to the private sector or other state and local government agencies. *Election '94: Assembly*, 25 Cal. J. 36-45 (May 1994).

There are 40 members in the California Senate. Senators serve staggered terms, with half of the seats up for election every two years. With the exception of one Senator who switched districts to finish out the term of a Senator who had been convicted of corruption, and who will be term limited out of office this year, other Senators will not face the term limits until 1998. Nevertheless, nine Senators have left the Senate this year. Four are seeking statewide office and one has gone to Congress. Interestingly, the movement between the Assembly, Senate, and Congress has not been all one way. Former California Congressman Tom Campbell returned to the California Legislature when state Senator Rebecca Morgan resigned to chair "Joint Venture," an entrepreneurial organization in Silicon Valley, and Representative Campbell lost the 1992 primary for a United

States Senate seat. *Election '94: State Senate*, 25 Cal. J. 31-35 (May 1994).

There are a number of lessons to be drawn from California's experience so far. First, just because legislators may no longer run for the same seats they have held for years does not necessarily mean the State of California will be deprived of their expertise in state government. On the contrary, there has been far greater interest on the part of legislators in statewide offices and other legislative seats. Term limits has not thrust those experienced legislators who still retain significant public support into political oblivion; rather, term limits has opened new opportunities for these legislators to serve the state in different capacities. Former Assembly members have relinquished their seats to run for state controller, state superintendent of public instruction, a superior court judgeship, State Board of Equalization, state Insurance Commissioner, Secretary of State, Attorney General, Lieutenant Governor, and of course, the state Senate. One former Assembly member is also running for Congress. Among the retiring state Senators, several entered primary elections for the offices of Governor, State Board of Equalization, state Treasurer, state Insurance Commissioner, and Lieutenant Governor. One is running for a seat on the Orange County Board of Supervisors. Scott, *Election '94: Governor*, 25 Cal. J. 8 (May 1994); Pollard, *Election '94: U.S. Senate*, 25 Cal. J. 11 (May 1994); Barber, *Election '94: Insurance Commissioner*, 25 Cal. J. 13 (May 1994); Borland, *Election '94: Lieutenant Governor*, 25 Cal. J. 16 (May 1994); Scott, *Election '94: Treasurer*, 25 Cal. J. 16 (May 1994); Starkey, *Election '94: Secretary of State*, 25 Cal. J. 17 (May 1994); Starkey, *Election '94: Attorney General*, 25 Cal. J. 18 (May 1994); Pollard, *Election '94: Superintendent of Public Instruction*, 25 Cal. J. 18 (1994).

Second, term limits has created more competitive elections. In the 1994 primaries, incumbent candidates faced numerous challenges. For example, for more than 20 years

the Westside area of Los Angeles was completely controlled by the political organization headed by Howard Berman and Henry Waxman. Legislators handpicked by the Berman-Waxman machine tended to stay in office forever--or until a demographically friendly congressional seat opened up. However, facing term limits in 1996, the three Assembly Democrats representing this area gave up their seats to run for statewide offices. In the June, 1994, primary, 22 Democratic and 5 Republican candidates vied for the privilege of serving Westside voters. The Berman-Waxman organization remained largely silent throughout the primary season. This silence may be the harbinger of a corollary benefit: the dismantling (or at least the lessening of significance) of political machines. Hill-Holtzman, *Seating Now Available: It Used to be That the Only Route to a Westside Assembly Job Went Through the Berman-Waxman Machine. Not Anymore*, Los Angeles Times, May 8, 1994, at J12. With California's 120 state legislative seats, 54 congressional seats, dozens of statewide offices (including administrative agencies), and literally hundreds of local government positions available, politicians who cannot bear the thought of working in the private sector have many other options available to them. Similarly, members of Congress who must run for reelection as a write-in candidate will consider the myriad opportunities otherwise available in public service. A change in scenery provides the growth and depth of experience that should be required of all lawmakers.

Third, the increased number of open seats has presented strong opportunities for women and minorities to make gains in their electability. Voters elected 16 men and 12 women in 1992, bringing the number of women in the Assembly to an all-time high of 22. The six Latinos elected in 1992 increases their numbers in the Assembly to seven from the previous high of four. The one new African-American elected in 1992 maintained the number of blacks in the Assembly at seven. The Class of 1992 also included the first Asian-American elected to the Legislature in 14

years. The 8 ethnic minority members elected to the Assembly compares to just 2 in the 24-member class elected in 1982. Weintraub, *After the Elections, State Assembly: 28 Newcomers Bring a Sense of Purpose*, Los Angeles Times, Nov. 8, 1992, at A3.

Fourth, the legislators elected under term limits are not complete political novices. Most have political experience in local government or community projects. For example, of the eight freshman in 1992 designated as the best of the class by the California Journal, one is a former community college trustee, two are former mayors, one is a former vice-mayor, one is a former deputy county counsel, two are attorneys (one of whom spent some time as a lobbyist), and one is a former sheriff. Block, *The Term-Limit Babies' First At Bat*, 25 Cal. J. 8 (June 1994). Many other members, although not active in local politics, bring to the Legislature real-life experiences in every facet of California society. For example, the Class of 1992 contained a home builder, a retired U.S. Air Force fighter pilot, a school teacher, an interior designer, an insurance company executive, and the owner of a chain of video stores. *Id.*

Finally, new faces in the Legislature do not diminish that body's ability to perform its lawmaking function. Even though the 1992 elections brought the highest number (32) of freshman legislators since 1978 (the year of the Proposition 13 tax revolt), the 1993 Legislature was hailed as one of the most productive in years. Skelton, *Legislators Try Something New: Action*, Los Angeles Times, Sept. 13, 1993, at A3. Moreover, the front page of the *Los Angeles Times* announced that "the California Legislature's 1993 session so exceeded the expectations of those trying to fix the battered economy that it is being described as a watershed in the state's posture toward business." Woutat, *State's Help for Business Seen as Watershed Shift*, Los Angeles Times, Sept. 13, 1993, at A1. The infusion of new legislators helped break the gridlock that has paralyzed the California

Legislature, leading to a promising new trend that should be replicated in Congress.

CONCLUSION

For the reasons stated herein, the decision of the Arkansas Supreme Court as it relates to congressional incumbents should be reversed. Amendment 73, which limits ballot access to multiterm congressional incumbents, does not impose any new qualifications that contradict the qualifications set forth in Article I, Sections 2 and 3, of the United States Constitution. Any multiterm incumbent may serve if elected by write-in or if appointed to the seat. The ballot access restrictions on multiterm incumbents should be analyzed under the same framework as any other ballot access restriction. Under this framework, Arkansas' Amendment 73 should be upheld in its entirety.

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Respectfully submitted,

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